1999

Southland Construction, Plaintiff/Appellee vs. GhazalehSemnani and Khosrow B. Semnani, Defendants/Appellants : Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

SOUTHLAND CONSTRUCTION, Plaintiff/Appellee, vs. GHAZALEH SEMNANI and KHOSROW B. SEMNANI, Defendants/Appellants.	**APPELLANT'S REPLY BRIEF** Court of Appeals No. 990193-CA District Court No. 960004927 Priority No. 15

Appeal from the Third District Court
In and For Salt Lake County, State of Utah
Honorable Michael K. Burton, District Judge

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ARGUMENT

I. THERE WAS NO ADMISSIBLE EVIDENCE THAT MR. AND MRS. SEMNANI HAD BEEN PERSONALLY SERVED

Rule 4(e)(1) of the Utah Rules of Civil Procedure provides that personal service shall be made:

> Upon any individual . . . by delivering a copy of the summons and/or the complaint to the individual personally, or by leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion there residing, or by delivering a copy of the summons and/or the complaint to an agent authorized by appointment or by law to receive service of process.

Appellee's Brief asserts that Mr. and Mrs. Semnani were properly served because (1) they were known to live at the address where service was left, (2) the person accepting service at that address did not identify himself, and (3) shortly after service of process Mrs. Semnani contacted Southland about the suit. As discussed in Appellant's Brief, none of these facts establish that Mr. or Mrs. Semnani were properly served.

First, the only admissible evidence in the record establishes that Mr. and Mrs. Semnani did not live at the address where service was made. *Compare* Appellant's Brief, Ex. A *with* Appellant's Brief, Ex. B ¶¶ 4, 5, 6. The only "evidence" asserted by Southland that Mr. and Mrs. Semnani actually lived at the residence at the time of service is a statement that a friend of Mrs. Semnani told Defendant's principal, Ms. Garza, that Mr. and Mrs. Semnani lived at the Mulholland Property. *See* Appellant's Brief, Ex. D ¶ 6. As discussed in Appellant's Brief, this is clearly inadmissible hearsay evidence.

Second, the fact that the Affidavits of Service indicate that a person failed to identify himself does not establish that in fact Mr. or Mrs. Semnani was served. A person could for any number of reasons refuse to identify him or herself. The critical fact is that the Affidavits do not attest that process was served on any defendant. There is no evidence that Mr. or Mrs. Semnani was the "John Doe" served by the constable. *See* Appellant's Brief, Ex. B ¶ 7.

Third, the fact that Mrs. Semnani called Ms. Garza and asked "what [she] was doing" does not in any way suggest that Mrs. Semnani had been properly served. At the most, it suggests that Mrs. Semnani knew about the lawsuit. However, as discussed in Appellant's Brief, actual knowledge of a law suit does not give a court jurisdiction over a defendant.

II. MR. AND MRS. SEMNANI WERE NOT REQUIRED TO PRESENT A MERITORIOUS DEFENSE IN ORDER TO VACATE THE JUDGMENT

A. Southland Failed to Raise the Meritorious Defense Claim Below

For the first time in the course of this case, Southland argues that because Mr. and Mrs. Semnani have not demonstrated that they have a meritorious defense, the motion to vacate was properly denied. Southland is entitled to "utilize the judicially created doctrine of affirming . . . on other proper grounds, even if [the grounds are] raised for the first time on appeal." *State v. Montoya*, 937 P.2d 145, 149 (Utah Ct. App. 1997). However, in order to properly and fairly use this doctrine, this Court requires thorough briefing of the issue. *Id.* at 150. As explained in *Montoya*:

[T]he appellee still has the burden of thoroughly briefing an issue, however

> recently it was raised. Under Rule 24(a)(9) of the Utah Rules of Appellate Procedure, which is applicable to an appellee through Rule 24(b), an appellee must provide an argument "containing the contentions and reasons of the [appellee] with respect to the issues presented, *including the grounds for reviewing any issue not preserved in the trial court*, with citations to the authorities, statutes, and parts of the record relied on." When an appellee fails to comply with this rule, we will decline to address the issue. . . .

Id. (emphasis added).

In support of its argument that Mr. and Mrs. Semnani failed to demonstrate any meritorious defense, Southland cites one case and devotes two lines to the argument. Not only is this not thorough briefing, but Southland failed to explain the grounds for reviewing the issue that clearly was not preserved in the trial court. Accordingly, this Court should decline to address the argument.

B. The Meritorious Defense Rule Does Not Apply to Jurisdictional Questions

Even if this Court decides to address the issue, Mr. and Mrs. Semnani still are entitled to prevail. Despite Southland's contention to the contrary, Mr. and Mrs. Semnani are not required to demonstrate a meritorious defense. There is no question that "when a motion to vacate a judgment is based on a claim of lack of jurisdiction, the district court has no jurisdiction: if jurisdiction is lacking, *the judgment cannot stand without denying due process to the one against whom it runs.*" *State Dep't of Soc. Servs. v. Vijil*, 784 P.2d 1130, 1132 (Utah 1989) (emphasis added) (citations omitted); *accord Garcia v. Garcia*, 712 P.2d 288, 290 (Utah 1986) (per curiam); *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 n.2 (Utah Ct. App. 1997). Consequently, when a party demonstrates that a court lacks jurisdiction, the

court can inquire no further; it must dismiss the suit. *See Atkinson v. Atkinson*, 43 Utah 53, 134 P. 595, 597 (Utah 1913) ("If a plaintiff can enforce such a rule, then he . . . would be permitted to take advantage of his own wrong, since he could compel the defendant in such an action to submit his or her person to the jurisdiction of the court, when neither personal nor subject-matter jurisdiction . . . could be obtained in any other way."). The only case Southland cites in support of its position indicates that the meritorious defense rule should not apply when the motion "is predicated solely on the ground that the court was entirely without jurisdiction." *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507, 510 n.5 (Utah 1976).

CONCLUSION

The trial court's error in denying the motion to vacate the default judgment is clear. It could not and did not have jurisdiction. In holding as it did, the trial court failed to consider the requirements of Rule 4(e) of the Utah Rules of Civil Procedure, and, instead, relied upon its finding that Mr. and Mrs. Semnani actually knew about the lawsuit.[1] A trial court does not obtain jurisdiction by a litigant's actual knowledge of a lawsuit. Accordingly, Mr. and Mrs. Semnani respectfully request that the trial court's order denying their motion

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[1] In Appellee's Brief, Southland concludes that "the [D]istrict Court found that the Defendants knew about the lawsuit, were actually served, and that good cause did not exist to set aside the default judgment." Appellee's Brief 4. This statement is incorrect. The District Court's order states that the District Court found "that the defendants knew about this lawsuit in the spring of 1996. Accordingly, this Court concludes that there is no reason to set aside the default judgment." Appellant's Brief, Ex. E. The District Court never found, as asserted by Southland, that Mr. and Mrs. Semnani were actually served or that good cause did not exist to set aside the default judgment.

to vacate the default judgment and quash writ of execution be reversed.

DATED this 27th day of July, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 1999, I caused two true and correct copies of the foregoing ***Appellant's Reply Brief*** to be served via United States mail, postage prepaid, addressed to:

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